From:	Mick Thomas
To:	Amy Johnson
Subject:	FW: IMA Comments to Docket No. 20-0302-1901
Date:	Saturday, November 16, 2019 12:59:50 AM
Attachments:	IMA comment letter 11.12.pdf

From: Benjamin Davenport <bdavenport@mineidaho.com>
Sent: Thursday, November 14, 2019 3:05 PM
To: Eric Wilson <EWilson@idl.idaho.gov>; Mick Thomas <mthomas@idl.idaho.gov>
Subject: IMA Comments to Docket No. 20-0302-1901

Gentlemen,

My apologies, it appears this has been stuck in my outbox since Tuesday. Please see the attached comments regarding your most recent draft. I hope that it is still early enough to affect or impact the rulemaking next week.

Please let me know if you have any questions.

Thank you,
Ben

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November 14, 2019

Idaho Department of Lands
Attn: Eric Wilson - Rulemaking
300 N. 6th St., Suite 103
Boise, ID 83702

Re: Rulemaking for IDAPA 20.03.02
Docket No. 20-0302-1901
Draft Rule No. 5 dated October 24, 2019

Dear Mr. Wilson:

The Idaho Mining Association (IMA) provides the following comments to the subject draft Rule.

A. General Comments.

We believe IMA's prior comments as they relate to IDL's role with respect to water quality have not been adequately addressed during the rule-making process. We remain concerned that duplicative, conflicting and potentially burdensome water quality requirements may be imposed by the subject draft rule.

HB 141 did not expand IDL's authority to regulate water quality impacts from mining operation. Rather, HB 141 expanded financial assurance requirements for mine operations to ensure adequate funds were provided to address water management at mines. The regulation and permitting of mine operations to protect water quality remains with IDEQ. We appreciate that IDL needs to obtain information related to how IDEQ will regulate water quality in reviewing a reclamation plan to ensure adequate financial assurance. We would suggest coordination with IDEQ through a MOA, or other mechanisms, to ensure that IDL has adequate water quality information to calculate financial assurance amounts. All of the legitimate water quality information that IDL seeks under the draft rule is provided in IPDES permit applications, IPDES permits, NEPA evaluations and points of compliance (POC) requests and authorizations. Our specific comments related to water quality provisions in the draft rule follow below.

B. Specific Water Quality Comments.

IDL Proposed IDAPA 20.03.02.10.02 (Definition)

~~03~~02. Best Management Practices. Practices, techniques or measures developed, or identified, by the designated agency and identified in the state water quality management plan, as described in IDAPA 58.01.02, "Water Quality Standards ~~and Wastewater Treatment Requirements~~," which are determined to be a cost-effective and practicable means of preventing or reducing pollutants ~~generated from nonpoint sources~~ to a level compatible with water quality goals. ~~(4-11-19)~~( )

IMA's concern. The existing definition, which IDL proposes to change, is basically verbatim from the definition of "BMPs" adopted by the Idaho Legislature in Idaho's Water Quality Act at Idaho Code Section 39-3602(3). IDL's proposed removal of "nonpoint sources" in the definition significantly expands IDL's authority to regulate all aspects of Mines including IPDES requirements. IMA is at a loss to understand how IDL believes it can regulate or supplement IPDES permits requirements by reason of HB 141 or that the legislature intended a different definition of BMPs than what is already codified in state statute. Admittedly IDL does have some limited role in recommending BMPs for "nonpoint source" activities at mines. (nonpoint source activities are runoff events into surface water that do not require an IPDES Permit and are generally considered to be runoff events in response to storms). However, the regulation of nonpoint source activities at mine sites is very limited or nonexistent because of changes made by Congress to the Clean Water Act related to storm water discharges from industrial sites (like mines) and EPA regulations which require NPDES (IPDES) permits for almost all storm water runoff from active, reclaimed and inactive mine sites. IMA believes that there is no reason to change the existing rule language which mirrors Idaho Code and whatever limited role IDL may have in regulating nonpoint source activities can remain in place.

IMA's Proposed Change. Do not change the current definition.

IDL Proposed IDAPA 20.03.02.10.24

~~51~~24. Water Balance. An inventory and accounting process capable of being reconciled that integrates all potential sources of water that are entrained in the mining operation or cyanidation facility or may enter into or exit from the mining operation or cyanidation facility. The inventory must include the water holding capacity of specific structures ~~within the facility~~ that contain process or stormwater. The water balance is used to ensure that all process water and other pollutants can be contained as engineered and designed within a factor of safety as determined in the reclamation plan or permanent closure plan. ~~(3-30-06)~~( )

IMA concern. The idea of a required "water balance" was focused solely on cyanidation facilities and was created by IDEQ in their cyanidation rules some 13 years ago, but has yet to be implemented. It should be noted that there is no requirement in state legislation for such a "water balance" at cyanidation facilities. It appears that IDEQ's initial motivation for a water balance may have been to ensure that wastewater exposed to cyanide was segregated, but even so, IDEQ Rules envisioned that such process water could be discharged if authorized by a permit. IDL's proposed definition substantially expands this limited concept in IDEQ rules and applies to all mines, as well as all storm water at all mines along with management and containment of all such water. The IPDES Permit requirements require a detailed description of water retention of storm water and process water ponds and limitations on what can be discharged. There is no requirement (other than for cyanidation facilities) to develop a water balance. A "water balance" should not be required for all mining operations.[1]

IMA's Proposed Change. Leave existing definition in place.

IDL Propsed IDAPA 20.03.02.10.25 (Definition)

~~52~~25. Water Management Plan. A document that describes the results of the water balance and the methods that will be used to ensure that pollutants are not discharged from a mining operation or cyanidation facility into waters of the state, unless permitted or otherwise approved by the DEQ. (3-30-06)( )

IMA's Concern. Similar to the comment above, A "water management plan" was focused solely on cyanidation facilities in IDEQ's Rule (yet to be implemented). Apparently IDEQ's motivation in requiring a water management plan was the same as a water balance, namely to minimize the amount of water impacted by cyanide. There is no requirement under the IPDES program to develop a water management plan for all mining operations (or even cyanidation facilities). In fact, many of the types of pollutants that IDL's apparently intends to regulate in the rule are authorized to be discharged in the IPDES program. The IPDES Permit requirements do set forth a number of specific requirements to demonstrate how water will be managed (and discharged) at a mine site. Similar to the comment above, IMA believes a "water management plan" should only apply to cyanidation facilities. "Water management" at other mine operations will be addressed in the IPDES program.

IMA's Proposed Change. Leave existing definition in place.

[1] In connection with IDEQ's current negotiated cyanidation rule-making (Docket No. 58-0113-1903), IMA is requesting that IDEQ delete the concepts of water balance and water management plans at cyanidation facilities because such concerns are adequately covered in the IPDES permit program.

IDL Proposed IDAPA 20.03.02.70.04.c, .d, .e, .f (Reclamation Plan)

c. A description of foreseeable, site-specific ~~impacts from acid rock drainage~~ water quality impacts and the BMPs that will be used to mitigate ~~any impacts from~~ such ~~acid rock drainage~~ water quality impacts. The purpose of this is not to duplicate a SWPPP or IPDES permit, but to have the operator characterize waste rock, tailings, and other potential sources of water quality impacts. This characterization can be used to evaluate the effectiveness of the planned mine design, support design criteria for mine components, and evaluate the need and length of a post closure period. ~~(3-30-06)~~( )

IMA's Concern. While IMA's appreciates the reference to IPDES Permit and SWPPP (A plan required in all storm water permits that describes how storm water will be managed), the proposed rule appears to misapprehend what IPDES requirements actually are. IPDES Permits and permit applications for both storm water permits (MSGP) and individual NPDES Permits do require a comprehensive characterization of waste rock, tailings and other potential sources. Similarly, a POC requires a comprehensive characterization of waste rock, overburden and tailings. IMA believes this section should state that a description of foreseeable site specific water quality impacts can be addressed by reference to IPDES applications, POC applications, SWPPP and IPDES Permit requirements.

IMA's Suggested Change:

c. A description of measures that will be implemented to ensure compliance with water quality standards. Such description can reference a IPDES permit application, IPDES permits and any point of compliance authorized by IDEQ.

IDL Proposed:

d. Water management plan for construction through post closure. This may include a SWPPP, IPDES permit application, Point of Compliance application to DEQ, documents and analysis done under NEPA, or any combination of these documents. ( )

IMA's Concern. See comments above on a water management plan applicable to all mines.

IMA's Suggested Change. Strike the word "plan".

IDL Proposed:

f. A description of post closure activities that includes the following: ( )

i. A water quality monitoring plan with sampling locations, frequencies, and constituents of interest.

( )

ii. Plan for segregating mine impacted water from stormwater, and managing these waters through the affected area. ( )

iii. Plan for managing mine impacted water to comply with Idaho water quality standards. ( )

iv. Care and maintenance for facilities after mining has ceased. ( )

IMA's Concern. HB 141 appears to require only a brief description of post closure activities. See Idaho Code Section 47-1506(a)(1)(viii). Such a brief description may be all that a mine operator can foresee before mine operations commence. HB 141 envisioned periodic review by IDL of reclamation plans (including post closure activities). Typically, the level of specificity set forth in this Rule will only be known with any certainty after mining commences or toward the end of mining. However even if an operator needs to make a best guess on post closure activities before commencing operations, the type of information required in this proposed rule is not appropriate and potentially creates duplicative requirements. Any water quality monitoring will be included in a mine operator's IPDES permit and any SWPPP. Similarly, required ground water monitoring will be specified in any POC authorization from IDEQ. IDL should not be requiring a separate monitoring plan beyond IDEQ requirements. In (ii) IDL introduces a new (and undefined) concept of "mine-impacted water". It is not known what is intended by this, certainly "storm water" can be mine impacted water (and typically during post closure storm water is probably the main or only source of water on site). Thus the requirement to "segregate" mine impacted water from storm water does not seem to make sense and in any event is not required under the IPDES Permit requirements.

IMA's Suggested Change:

f. A description of expected post closure activities that includes the following:

i. Identify all IPDES permits and points of compliance that will likely be required.

ii. A description of likely water storage facilities.

iii. A description of care and maintenance activities.

IDL Proposed IDAPA 20.03.02.140.01 Introduction and 01.

140. BEST MANAGEMENT PRACTICES AND RECLAMATION FOR ~~SURFACE~~ MINING OPERATION AND PERMANENT CLOSURE OF CYANIDATION FACILITIES.
~~Enumeration of a practice or act in Section 140 shall not be construed to require its specific inclusion in a reclamation or permanent closure plan.~~ These are the minimum standards expected for all activities covered by these rules. Specific standards for individual mines may be appropriate based on site specific circumstances, and must be described in the plan. ~~(3-30-06)~~( )

01. Nonpoint Source Control. (3-30-06)

a. Appropriate BMPs for nonpoint source controls shall be designed, constructed, and maintained with respect to site-specific ~~surface~~ mining operations or permanent closure activities. Operators shall utilize BMPs designed to achieve state water quality standards and to protect existing beneficial uses of adjacent waters of the state~~, but shall not be required to do more than is necessary to preserve the condition of runoff from the affected land or the cyanidation facility prior to conducting any exploration, surface mining or cyanidation facility operations. These measures shall be among the first to be taken, if necessary, to protect water quality~~. State water quality standards, ~~including protection of existing beneficial uses~~ as administered by DEQ, shall be the standard that must be achieved by BMPs ~~unless the operator can show, and the director determines, that a lesser standard existed in the area to be affected prior to the commencement of the subject surface mining or exploration operations~~. ~~(3-30-06)~~( )

IMA's Concern. As noted above, this section should not be revised from the current version. IDL's authority over nonpoint source controls at mines was not changed by HB.41.

IMA's Suggested Change. Leave existing text in place.

IDL Proposed IDAPA 20.03.02.140.03:

03. Water Management or Treatment. Mine impacted waters that contain metals or other contaminants subject to the water quality standards in IDAPA 58.01.02 or 58.01.11 must be captured on the mine site and segregated from stormwater to the maximum extent practicable. Specific water management or treatment methods may include, but are not limited to: ( )

a. Capturing water runoff at the toe of a waste rock dump, tailings impoundment, ore stockpile, or other source of mine impacted waters. ( )

b. Adding lime, flocculants, or other inputs to modify the physical or chemical properties of the water. ( )

c. Filtering water. ( )

d. Moving mine impacted waters by ditches, pipes, pumps, or other methods around a site. ( )

e. Holding water in ponds. ( )

IMA's Concerns. As noted, there is no definition for "mine impacted waters" and there is no requirement to "segregate" mine impacted water (whatever that means) from storm water. IPDES permits address these issues in much greater detail than what is described in the proposed rule. Further, IDL has no experience or expertise on what type of treatment may be required to meet water quality standards. Indeed, even IPDES requirements do not specify any particular type of treatment, they just simply require discharges from mines to meet water quality standards. It is up to the mine operator to decide what type of treatment is appropriate.

IMA's Suggested Change. IMA believes this section should be deleted.

C. Other Comments to the Subject Rule.

Section 010.08.b. "Material Change." A new opening to an underground mine should not automatically constitute a material change unless it would otherwise be considered a material change under the current definition (e.g., increases reclamation costs by greater than 15%).

Section 080.05. This section should be revised as IDL's role with respect to nonpoint source activities at mines were not changed by HB 141.

Section 120.04. Indirect Costs. Please strike subsections **g** and **h** because re-engineering costs and contingency as a percentage of direct costs should not be considered indirect costs.

Section 120.08. IMA requests that this change mirror the language in HB 141 related to CERCLA actions.

Section 120.09. Financial Assurance Reduction. Please strike "initial" in this subsection as an operator should be able to request reduction in financial assurance during the course of reclamation.

Section 120.10. This subsection needs to be revised to be consistent with HB 141 (Idaho Code § 47-1512(h)). It needs to make clear that a reduction or release of financial assurance applies to substantial completion of all or portions of both a reclamation plan and post-closure activities and that release of the financial assurance by IDL is mandatory (upon a finding by IDL of substantial completion).

Section 121.04. Cyanidation Facility, Indirect Costs. Strike subsections **g** and **h** for the reasons previously stated.

Section 122.05.d.
We believe bonds held by a trust can be rated less than "AAA" or "AA" as the rate of return on such bonds can be higher. This type of decision should be left to the trustee and not IDL Rules. We suggest striking this subsection.

Section 122.05.a. Disbursements from the trust. We are not clear what is intended in this subsection. If the partial release of funds by the trust is due to substantial completion of portions of either a reclamation plan or post-closure, it should be governed by Idaho Code § 47-1512(h).

Thank you for the opportunity to comment on the subject draft Rule and we look forward to further negotiation of a proposed rule.

Sincerely,

Benjamin J. Davenport